58TH CONGRESS, 2d Session. | SENATE. | REPORT No. 2128.

TO PERMIT AN ACTION TO BE COMMENCED BY AMERICAN CITIZENS FOR VESSELS SEIZED IN BERING SEA.

APRIL 13, 1904.—Ordered to be printed.

Mr. MORGAN, from the Committee on Foreign Relations, submitted the following

REPORT.

[To accompany S. 3410.]

The Committee on Foreign Relations, to whom was referred Senate bill 3410, report the same with sundry amendments and recommend its passage.

The same measure was offered in the House of Representatives and referred to the Committee on the Judiciary.

That committee took the opinion of the Attorney-General as to the propriety of the proposed legislation, which being favorable to the bill, the committee reported it to the House of Representatives favorably with a written report as follows:

The purpose of the foregoing bill is to give to citizens of the United States the right to commence an action in the circuit court of the ninth judicial district to recover from the United States damages for the unlawful seizure, by officers of the United States, of vessels and cargoes belonging to said citizens, and confiscating and selling the same. The history and facts, out of which the claims for damages arise, are as follows:

The United States having claimed exclusive jurisdiction of that part of Bering Sea inclosed within the boundaries of Alaska, as ceded by Russia, and Russia having claimed dominion of the waters of that sea west of said boundary line, each nation treated Bering as a mare clausum. Acting upon this claim of exclusive jurisdiction the United States, by official order of the Secretary of the Treasury, instructed the commanders of the armed ships of this Government to seize all vessels and arrest and deliver to the proper authorities any or all persons detected in the taking of seals in any part of said sea. In the execution of this order a large number of such vessels, the property of British subjects, and a larger number, the property of citizens of the United States, were seized and otherwise interfered with, to the loss and damage of owners and other parties interested in their voyages. Russia, in like manner, in the part of Bering Sea claimed to be under her dominion, made seizures of the same class and character of vessels belonging to citizens of the United States and to the subjects of Great Britain.

Thereupon Great Britain denied to the United States and Russia the exclusive jurisdiction to Bering Sea, by which these seizures were justified by them, and the issue of jurisdiction was finally arbitrated between the United States and Great Britain at Paris, under the treaty of February 29, 1892. Though the contention of the United States was ably sustained, the arbitral decision was that Bering is an

open sea, and that municipal jurisdiction has no vigor upon its waters beyond the 3-mile limit. After this settlement of jurisdictional rights, as was agreed between the United States and Great Britain by the articles of February, 1896, a judicial commission was constituted by the two Governments to examine the claims for indemnity made by the subjects of Great Britain for the seizure of their vessels and interference with their voyages in Bering Sea. The articles provided that this commission should meet at Victoria, in British Columbia, and proceed to the discharge of its duties. There were filed before and considered by the commission 23 claims, aggregating $1,289,008.77.

Counsel for the United States were under the disadvantage of the session being held in Victoria, the outfitting port of the sealing fleet and of the British claimants, where the population was hostile to the case of the United States, by reason of personal and commercial relations with the British sealers and their occupation. Requiring evidence on the question of value involved in the British claims, counsel for the United States depended on the American sealers, whose expert testimony, when requested, was given, though their own vessels had been seized and their property taken from them by the United States, in like manner as the British subjects. These American sealers organized themselves to find testimony for their Government in reducing the British claims to legitimate volume, and also to physically protect themselves and the witnesses among them from the personal violence which was often threatened and from the assaults that were made by the sympathizers with the British claimants. By the testimony of these Americans, counsel for the United States were able to reduce the British claims from $1,289,008.77 down to $463,454.27, principal and interest, thus saving to the United States $825,554.50.

The American sealers rendered this essential service to their Government under circumstances of difficulty and some danger to themselves, without exacting any promise of requital by consideration and payment of their own losses. But the counsel of the United States felt that their honorable and patriotic conduct deserved that their rights be determnied, that their losses might be indemnified. Some of these American sealers had also been despoiled by Russia in her part of Bering Sea, and subsequently to the Victoria award the United States demanded that Russia indemnify them. This demand was arbitrated at The Hague by Doctor Asser, who decided for the Americans, and Russia promptly paid the award. Great Britain is now demanding indemnity for her subjects whose property was seized by Russia in the same manner, and the matter is under diplomatic arrangement for payment.

By the foregoing it will be seen that the United States has indemnified the sealers who were subjects of Great Britain; Russia has indemnified those who were citizens of the United States that were despoiled in her waters, and is about to indemnify in like manner and for like cause the subjects of Great Britain, and that the equities involved have been passed upon at Paris, Victoria, and The Hague. The only group left without indemnity, and suffering poverty from the loss of their property, is that from which came the witnesses whose testimony protected the Government at Victoria. Senate file 3410 is to give them their day in court that their rights may have judicial examination. The statements following, by counsel of the United States in the judicial arbitration at Victoria, extend the foregoing by facts and references.

Memorandum by Don M. Dickinson, sometime senior counsel of the United States in their defense against the claims of Great Britain for seizures of sealing ships and other property in Bering Sea, besides other damages provided to be recovered in the cases scheduled in the convention between the two nations of February 8, 1896.

By the treaty of 1892 the United States and Great Britain agreed to submit the issue of the exclusive jurisdiction of Bering Sea to arbitration. By Article VIII of said treaty it was agreed that either nation might submit to the arbitrators any questions of fact involved in claims arising in the disputed jurisdiction, and ask for a finding thereon, the question of the amount of liability of either Government upon the facts found to be subject of further negotiation. Under that treaty the issue was arbitrated at Paris, and the issue of jurisdiction was decided adversely to the claim of the United States. In their finding of facts under Article VIII the arbitrators found that the several searches and seizures of ships and goods, and the several arrests of crews and masters, mentioned in the schedule to the British case were made by authority of the United States Government, and such seizures, arrests, fines, and imprisonments were for alleged breaches of the municipal law of the United States, committed beyond the 3-mile limit.

This made the United States liable for such seizures and other acts, and left the amount of such liability and the evidence to determine it to further negotiation. This was had in the convention between the United States and Great Britain of February 8, 1896, by which it was stipulated "that all claims on account of injuries sustained by persons in whose behalf Great Britain is entitled to claim compensation from the United States, and arising by virtue of the treaty aforesaid (of 1892), the award and findings of the said tribunal of arbitration shall be referred to two commissioners, one of whom shall be appointed by the President of the United States and the other by Her Brittanic Majesty, and each of whom shall be learned in the law."

The claims described included all whatsoever arising in the treaty of 1892, and the award and findings thereunder.

The convention of 1896 also stipulated that the Commission "shall meet at Victoria, in British Columbia, and after taking an oath that they will fairly and impartially investigate such claims and render a just decision thereon they shall proceed jointly to the discharge of their duties."

In my report to the honorable Secretary of State, January 8, 1898, I had the honor to say of Victoria as the place of hearing:

"We were brought for the hearing to the principal seat of the pelagic sealing industry of Canada and Great Britain. At that port the complaining British ships were for the most part outfitted for Bering Sea. Among this population from which testimony was to be drawn there was naturally a hostile feeling toward the United States, and toward any person among them having knowledge of the facts who showed any disposition to furnish information in chief on the stand for this Government, or to furnish information on which the statements of the witnesses for Great Britain might be tested on cross-examination."

All questions having been settled except the amount of liability, the crux of the case of the United States was the finding of testimony to fix that at a just and proper sum in each case. The evidence to do this was presented by American sealers, and there was no other source from which to seek it. Without their testimony and the facts they could furnish for use in guiding the cross-examination of the British witnesses counsel for the United States could have been practically compelled to accept the amounts and proofs submitted in the British case. In this emergency counsel requested the American sealers to give their Government the benefit of their testimony and knowledge, though aware that it had also seized, destroyed, or alienated their ships and property and interfered with their voyages in Bering Sea. The Americans responded to the call of their country, and, led by Captains McLean, Minor, and Raynor, organized a force which industriously hunted up testimony for the American counsel, and, as stated in my report to the honorable Secretary of State of January 8, 1898, "enabling them to sift and expose fictitious claims and to reduce unreasonable and exorbitant valuations to reasonable proportions, and by affording counsel who conducted examinations of witnesses some equipment in knowledge of facts and of the men."

Conspicuous amongst the Americans was Capt. Alexander McLean. He owned a half interest in two ships seized by the United States, for which Great Britain demanded indemnity. His coowner, a British subject, had sworn before the Paris tribunal that he was the sole owner. The registry of the ships did not disclose Captain McLean's interest. Under the stipulations nothing could be awarded to him, an American. But a full award to the two ships would have benefited him to the extent of his equities in them. Under the circumstances, this brave and honest man made oath before the Commission to his part ownership, when by silent assent to the perfidy of his partner he would have been benefited himself. Not only did Captain McLean lose by his truthfulness, but his activity in behalf of the United States subjected him to many unpleasant experiences and personal risk at the hands of the British claimants and their friends in Victoria. Surely such a man and his countrymen, the American sealers, who joined, defended, and sustained him, not only deserves the consideration of his Government, but has earned the praise of the Psalmist given to "him who sweareth to his own hurt, and changeth not."

Counsel for the United States being driven, by construction of the terms of the convention, to a hearing of every case from beginning to end at Victoria, of necessity had to bring these American sealers as witnesses into that seat of inimical sentiment and to subject such of them as were resident there to its rigors. But their unfailing loyalty and intimate knowledge of the value of vessels, outfits, and catch on hand when seized were so useful to the Government that by it counsel were enabled to scale the sum of the claims made from $1,289,008.87 down to $413,979.27, a reduction of nearly two-thirds. As the United States had realized from the sale of the libeled property the sum of $83,073.72, the award called for only $380,380.55 to be paid by this Government.

To state fully the result of the trial: The British claims, including costs, and two ships which counsel succeeded in excluding from consideration, and personal claims, amounted, principal and interest, to $1,417,137.93, while the award was only $294,188.91 principal and $169,265.36 interest, a total of $463,454.27.

RÉSUMÉ.

It is to be observed that by the Paris award, which was the law of the sea, the taking of seals by the nationals of every country was as lawful beyond the 3-mile limit as was the taking of fish on the high seas beyond that limit at the time of the seizures of the property of the British subjects, tried out at Victoria. It was as unlawful for the armed vessels of the United States to take or destroy ships or their property beyond the 3-mile limit in Bering Sea, as in any other part of the high seas. It is quite apparant that there was no law of the United States intended to discriminate against our own citizens. It was intended by all the seizures of American and other vessels in Bering Sea to test the authority of the United States over those waters as against other powers, and especially Great Britain. So that, as a matter of law, there was no municipal law punishing pelagic sealing as against our own citizens, or based on any other theory than that the United States had an exclusive jurisdiction of those waters, with the ultimate object, if it were found by arbitration between the nations that we had no exclusive jurisdiction, to arrive finally at an international agreement by which sealing would be regulated in those waters.

By there being no adverse international law by which Americans could be punished for sealing in those waters, and no municipal law for any other purpose than this, the Americans who suffered from seizure, interference, and destruction of their property, in an occupation agreed by all not to have been in violation of any treaty, are entitled to reclamation. Some of them, by freely exposing their nationality, lost their interest in British ships. By coming forward and supporting the position taken by their country in regard to the protection of seals, every man of them sacrificed himself, by clearly praiseworthy and patriotic conduct. They aided their country at Victoria in exposing the frauds and abating extravagant values in the British claims. Their service was invaluable. They had to conquer personal safety for the witnesses of the United States in Victoria by aggressive fighting for it on the streets. I, as of counsel, vouch for it, that it was owing to them that many British claims were entirely thrown out, and the final award was about one-third of the aggregate amount claimed.

If any American presented a claim at Victoria under cover of the British flag, and there were such, he can take no benefit under this bill. But Americans who did not attempt such practices and who suffered loss should be given the same measure of relief as that accorded by the United States in the convention and awarded to British claimants at Victoria.

CHRONOLOGICAL.

The claims of British citizens were heard by a commission appointed pursuant to the convention of February 8, 1896, between the United States and Great Britain.

The award of this commission was paid in pursuance of an act passed by the second session of the Fifty-fifth Congress and approved June 15, 1898, entitled "An act making an appropriation to pay the Bering Sea awards."

The claims of citizens of the United States have never been presented before any tribunal.

The vessels of the claimants and property of the claimants were seized for an alleged violation of sections 1956 and 1957 of the Revised Statutes of the United States.

The first order for seizure was issued by the Treasury Department under date April 21, 1886. Instructions were issued in 1887, under date of May 10 and May 28, by the Treasury Department that seizures should be made.

The second session of the Fiftieth Congress passed an act, approved March 2, 1889, entitled "An act to provide for the protection of the salmon fisheries of Alaska." Section 3 of this act provided that it should be the duty of the President to issue a proclamation warning all persons against violation of the provisions of section 1956, which section was by this statute declared to include all the dominion of the United States in the waters of Bering Sea.

A proclamation was issued by the President of the United States (26 Stat. L., 1543) warning all persons against entering the "waters of Bering Sea within the dominion of the United States."

The contention for damages was, and is, that if the treaty of cession of Russia (concluded March 29, 1867) did not give the United States jurisdiction over any portion

of Bering Sea outside of the ordinary 3-mile limit from the shores of the mainland and islands, the United States had no exclusive jurisdiction over that portion of Bering Sea, and the seizures of vessels engaged in the lawful pursuit of hunting for seals when outside the 3-mile limit were illegal.

Great Britain raised this question on behalf of its citizens and the treaty was concluded (27 Stat. L., 101), providing for a tribunal that should ascertain the extent of the exclusive jurisdiction of the United States in the waters of Bering Sea.

The award of the tribunal of arbitrators constituted under this treaty (printed in Vol. 1, American Reprint Fur Seal Arbitration, etc., p. 77) determined "that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary 3-mile limit."

The second session of the Fifty-third Congress enacted a law (28 Stat. L., 52) to give effect to the award of the tribunal of arbitration.

Congress, by the terms of this last-mentioned act, admitted that the language of sections 1956 and 1957 did not make illegal the taking of fur seals in the waters of Bering Sea outside the ordinary 3-mile limit, for this act provided that the two governments (Great Britain and the United States) should prevent their citizens from taking seals within a limited time on the high seas in the part of the Pacific Ocean inclusive of the Bering Sea, which is situated, etc.

February 8, 1896, a convention was concluded between the United States and Great Britain for the settlement of the claims presented by Great Britain against the United States.

December 17, 1897, the commissioners agreed upon an award, but the claims of the American citizens, if any were presented, were excluded by the high commissioners.

The circuit court for one of the California districts should be given jurisdiction to hear the claims of the American citizens who suffered the same damages as British subjects, who have been paid by this Government.

The records and files of the Treasury and State Departments disclose the names of all sealing schooners seized or interfered with, including those from which seal skins or hunting equipment were taken, and including all schooners which were merely warned or driven out of Bering Sea during the sealing seasons. So that the number of claims under the proposed bill can be fixed and limited by those records.

The foregoing statement of the case is made by me in discharge of an obligation of honor incurred by their helpful and patriotic conduct in behalf of their Government during the trial of the British claims at Victoria. I have and can have no other interest in their case. Their Government owes them indemnity for their losses, and the procedure provided in the Senate bill amply protects its rights, while giving them the opportunity to have theirs ascertained. If I can serve them further, it will be my pleasure, with no other reward than the satisfaction of requiting their unselfish patriotism at Victoria.

The statement of Hon. Don M. Dickinson, incorporated in the foregoing report, presents a case that appeals forcibly to the sense of justice and equity of the Government of the United States for the compensation of the losses and damages sustained by our citizens through the enforcement of laws that were in effect annulled by the subsequent award of the Bering Sea Commission, that is referred to in this bill.

The awards of compensation to British owners of sealing vessels for seizures by the United States under like conditions, that were made by the International Commission appointed under the convention between Great Britain and the United States of February 8, 1896—of which Commission Mr. Dickinson was a member—while they could not make provision for our citizens, clearly show that they are entitled to like compensation for the seizure of their vessels.

The object of the bill is to enable them to establish their claims in a judicial proceeding before the circuit court of the United States for the ninth circuit, which is the nearest court of competent jurisdiction to the localities where the seizures were made, and is most accessible to the witnesses, who, for the most part, are seafaring men residing in that vicinity.

The rulings of the Commission of 1896 that made the awards in favor of British subjects are worthy of consideration by the circuit court as to the measure of damages and the proper scope of inquiry as to the right of compensation to be considered by the court, lest the committee doubt the propriety of adopting them by act of Congress, and recommend the amendment of the bill as to that and some other features that do not materially affect the equitable and just right of the claimants to the relief they seek.

The question of the allowance of interest on the claims is left to the just discretion of the court as to each claim that is presented, according to its merits.

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